

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1008

B
P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant

-vs-

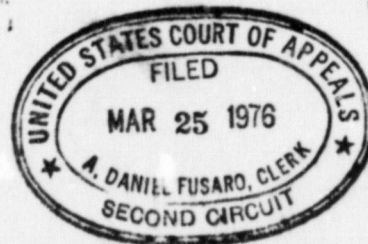
FRANK ALTESE, a/k/a Frankie Feets, et al.,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

FRANK ALTESE, et al.,

Defendants

PRELIMINARY STATEMENT

The Government has appealed from an order of the United States District Court for the Eastern District of New York (Mishler, C. J.) entered on November 26th, 1975, which dismissed prior to trial four counts of an eight count indictment alleging gambling and racketeering offenses. The Government is appealing the dismissal of counts one and two of the indictment charging violations of 18 U. S. C. §1962(c) and (d).

The facts are not extensively treated here since they are amply set forth within the Government's and various briefs of the defendants.

We endeavored to limit our argument to a few comments seemingly not considered elsewhere.

POINT 1

THE DETERMINATION OF THE DISTRICT
COURT IS PROPER IN LAW

Counts one and two of the indictment dismissed by the District Court allege purported violations of Title 1X of the Organized Crime Control Act of 1970, 18 U. S. C. , Section 1962. The plain intent of Congress and the language of the statute proscribes the infiltration of legitimate business by so-called organized crime persons.

The defendants are charged within the dismissed counts of the indictment with concerted gambling violations which are chargeable under Section 225.10 of the New York State Penal Law. It was never the intent of Congress that 18 U. S. C. , Sections 1962(c) and (d) encompass conduct described in counts one and two of this indictment.

The indictment is utterly devoid of any allegation that the defendants were involved in any "enterprise" but that of illegal gambling. Indeed, the Government has exclusively charged that the defendants were involved in illegal gambling activities "chargeable under Sections 225.10 of the New York State Penal Law. "

Title 1X "has for its purpose the elimination of infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce". Senate Report at 76. Similarly, the house report states that "Section 1962 establishes a three-fold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations". House Report at 4033.

United States -vs- Cappelto, 502 F. 2d 1351 (7th Cir. 1974) upon which the Government places heavy emphasis was erroneously decided. The Government's reliance upon United States -vs- Parness, 503 F. 2d 403 (2d Cir. 1974) is also misplaced. The Parness case is only relevant to the issue of "infiltration" of foreign as well as domestic legitimate enterprises. 503 F. 2d at 439. The better reasoned view was expressed in United States -vs- Amato, 367 F. Supp. 547 (S. D. N. Y. 1973) which held that Section 1962, supra, "makes it unlawful to invest the proceeds of racketeering in legitimate business, and Section 1962(d) makes it unlawful for any person to conspire to violate any provisions of Section 1962." 367 F. Supp. at 549.

The definition of "enterprise" can be gleaned from the definitions of the other key words in the statute i. e. the "pattern of racketeering activity" and "collection of unlawful debt". Thus, if you read "enterprise" as illegal gambling enterprise you end up

with a patently absurd result.

The Government at P. 12 of their brief are confused between "non-legal groups" and the concept of legal entity.

The Government completely neglects the facts of this case.

The Government's reasoning is ludicrous inasmuch as the statute would have to be interpreted according to the Government to hold that " It shall be unlawful for any person employed by or associated with a gambling enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of acts involving gambling or collection of a debt incurred or contracted in gambling activity. "

CONCLUSION

THE DETERMINATION OF CHIEF JUDGE
MISHLER SHOULD BE AFFIRMED.

Respectfully submitted,

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